United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 3, 2006

TO : Ralph R. Tremain, Regional Director
Region 14

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT : International Brotherhood of Teamsters Local 600;
International Brotherhood of Teamsters; and
Change To Win Coalition (Anheuser-Busch, Inc.)
Cases 14-CE-89, 14-CE-90, and 14-CE-91

177-3950-3600
560-5067
584-1225
584-3701
584-3760
584-7500
725-3375

This Section 8(e) matter was submitted for advice regarding whether (1) a new labor coalition violated Section 8(e) of the Act when it entered into a commercial sales agreement with neutral Hotels for a new labor federation's founding constitutional convention; (2) whether the new labor coalition was a labor organization under the Act when it entered into the sales agreement; and (3) whether International Brotherhood of Teamsters ("IBT") and Teamsters Local 600 also violated Section 8(e).

In the sales agreement with the coalition, the Hotels[1] agreed to refuse beverage deliveries from a distributor for a 30-day period extending before and after the new labor federation's constitutional convention, which was held at the Hotels. The distributor whose deliveries were subject to the ban had a primary labor dispute with Teamsters Local 600. In separate letters, the Hotels also announced to the labor coalition that they would refuse to serve those stockpiled beverages that had previously been delivered by the distributor during eight days of the 30-day ban on deliveries. The labor coalition that signed the sales agreement and the labor federation that arose out of the constitutional convention assertedly were separate organizations.

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[1] Marriott International, Inc. owns the two hotels in question and negotiated the sales agreement.

We conclude that the charge alleging a Section 8(e) violation committed by the labor coalition should be dismissed, absent withdrawal. This charge presents difficult and novel legal questions, and this case is not the proper vehicle to put these difficult issues before the Board. First, whether this coalition of labor organizations organized to establish a new labor federation and then to cease to exist, was a labor organization is a case of first impression; and because the coalition no longer exists, it is a unique case which is unlikely ever to recur.[2] Second, if the coalition was a labor organization, the question whether Section 8(e) was violated arises in the context of a labor organization acting as a customer of services in a commercial transaction rather than acting solely in its capacity as a labor organization. In this context, there is a serious question whether Congress was concerned with this type of conduct. Further, to the extent that the sales agreement between the Hotels and the labor coalition arguably constituted a Section 8(e) agreement, it is a contract of very limited duration. Under all of these circumstances, this case is not the appropriate vehicle to present these novel and difficult issues to the Board. Thus, the complaint should be dismissed, absent withdrawal.

Because we conclude that the Section 8(e) charge against the labor coalition should be dismissed, absent withdrawal, the Section 8(e) charges filed against IBT and the Teamsters Local 600, based on the fact that an employee of the IBT negotiated the contract with the Hotels should also be dismissed, absent withdrawal. We need not reach the questions whether IBT acted as an agent of the labor coalition or of Teamsters Local 600 in entering into the sales agreement, or whether the labor coalition was acting as an agent of IBT or of Teamsters Local 600.

FACTS

Background:

The Change To Win Coalition Is Founded

In June 2005, IBT, Laborers' International Union, UNITE-HERE, SEIU, and UFCW, all members of the AFL-CIO, formed the Change To Win Coalition ("CTWC") and drafted a constitution and by-laws to promote and coordinate the

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[2] Subsidiary to this issue are the questions whether, if the coalition was a labor organization, but no longer exists, (1) is CTW a successor to or alter ego of CTWU which could be perused, and if not (2) what remedy would be available against the defunct CTWC?

efforts of their affiliated organizations "to boost union strength and improve workers' lives," and to "unite workers in their industry and raise standards for pay, health care, pensions, and working conditions."[3] As was later announced, CTWC "was founded in June by unions representing more than 5 million workers, with a key focus to unite the 90 percent of workers not yet in a union so that all working people in this country can build the power to make their voices heard in their jobs, their communities, and in Washington."[4] CTWC aimed to persuade the AFL-CIO to adopt CTWC'S agenda, which included an increased focus on organizing and on governance issues; CTWC planned to implement its ideas whether CTWC's constituent organizations remained within AFL-CIO or disaffiliated from it.[5] Shortly thereafter, in June and July, the Carpenters and United Farm Workers joined CTWC.[6] In early July, CTWC chose two of its top officers.[7]

By August, after concluding that the efforts to persuade the AFL-CIO to adopt the CTWC agenda had failed, most of CTWC's constituent organizations had disaffiliated from the AFL-CIO.[8] CTWC scheduled its founding constitutional convention for September in St. Louis.[9]

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[3] See www.changetowin.org. A CTWC press release dated June 15, 2005, announced that CTWC was "a new alliance devoted to creating a large-scale, coordinated campaign to rebuild the American labor movement." The press release further announced that at a June 15 meeting, "with 50 top officials from the unions, the [CTWC] approved a Constitution and Bylaws that would promote the coordination, cooperation and collective action of their affiliated organizations. . . ."

[4] www.changetowin.org

[5] www.changetowin.org/press/Overhaul063005.html; www.changetowin.org/press/NewCoal061505.html.

[6] www.changetowin.org/press/Carpenters062705.html; www.changetowin.org/press/UFW072205.html.

[7] www.changetowin.org/press/Officers070605.html.

[8] Those who had disaffiliated included IBT, SEIU, UFCW, and UNITE-HERE. The Carpenters disaffiliated in 2001. See BNA, 178 LRR 5 (October 3, 2005).

[9] The principal officers of each of the 7 unions formed the CTWC leadership council. For example, UNITE-HERE's executive vice president became CTWC's secretary-treasurer. See BNA, 178 LRR 5 (October 3, 2005); www.ilwu.org. The new federation, as the CTWC/CTW Chair stated, was to be a "powerful vehicle . . . to ensure that all working families

Change To Win Is Founded

At the St. Louis convention, CTWC became Change To Win ("CTW"), and the delegates ratified a constitution. The CTWC's chair and secretary-treasurer became CTW's Chair and vice president. The ratified constitution includes the following language regarding the organization's mission and objectives:

> To unite working people for economic, political, and social justice;
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> To ensure that work and working people are valued . . .;
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> To raise working and living standards for all working people and to win paychecks that support a family . . . .
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> To ensure equal opportunity and rights for all women and men . . . .
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> To coordinate workplace, political, and social action with worker organizations world wide to establish cross-border standards for decent working and living conditions.
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> To take all actions necessary and appropriate to furthering and achieving these goals on behalf of working people and their families.

The new constitution required that each national and international union pay a monthly per capita tax to CTW and required that 75 percent of the per capita taxes be devoted to organizing. Under the new constitution, CTW's governing body would include a leadership council comprised of the principal officers of each member union and three at-large members. The constitution also provided that CTW would control which constituent groups would join or remain within the labor federation.[10]

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benefit from the global economy," and was "to use the resources of the affiliated unions to wage a massive campaign to empower the millions of American workers who are currently deprived of a strong voice on the job and in their communities." www.changetowin.org/pdf/conventionPR.pdf.

[10] See BNA, 178 LRR 5-6 (October 3, 2005).

The primary labor dispute

Lohr Distributing, Inc. ("Lohr") is the exclusive distributor of Anheuser-Busch ("AB") products throughout the city of St. Louis. Teamsters Local 600 has a contract dispute with Lohr. Since May 22, 2005, Lohr employees, represented by Teamsters Local 600, have been engaged in an economic strike that arises out of a bargaining dispute. In connection with that strike, Teamsters Local 600 called on local St. Louis businesses to boycott AB products.[11]

By letter dated September 13, 2005, AB informed Teamsters Local 600 that Local 600 agents had picketed unlawfully on September 9 at the entrances to AB's brewery and headquarters. AB further informed Local 600 that their agents' conduct unlawfully embroiled AB, as a neutral, in Local 600's dispute with Lohr.[12]

The Renaissance St. Louis Grand Hotel and the Renaissance St. Louis Suites Hotel ("the Hotels") are located across from each other on Washington Avenue, St. Louis. Marriott International, Inc. owns the Hotels. UNITE-HERE Local 74 represents the service employees employed by the Hotels under a three-year collective-bargaining agreement effective April 2005.[13]

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[11] Some St. Louis businesses that rely on Lohr to distribute AB products have honored the request of Teamsters Local 600 to boycott AB products. Teamsters Local 600 has distributed fliers that have outlined the issues underlying the dispute with Lohr and have asked that consumers not purchase AB products, delivered by Lohr, the exclusive St. Louis distributor of AB products. The fliers also have urged employees not to cease working and have suggested that consumers enjoy AB products anywhere but within the city of St. Louis.

[12] Two other charges filed by AB against Local 600 and IBT that related to picketing and the Lohr dispute were resolved. In October 2005, AB and Local 600 entered into a settlement agreement in Case 14-CC-2512 in which Local 600 agreed not to picket AB. Also in October, AB withdrew its charge against IBT in Case 14-CC-2513 because the evidence showed no link between IBT and any alleged unlawful picketing of AB.

[13] UNITE-HERE was not involved in the negotiations over the three groups' meetings, discussed below.

The Hotels usually sell AB products through room service, in banquet facilities, and in restaurants and bars, which are open to the public. Lohr usually makes deliveries of AB products to both Hotels at the same time. The frequency of the deliveries, whether daily or twice weekly, depends on the number of guests and the guests' consumption of AB products.

Teamsters representatives appeared and picketed the Hotels on about three occasions when Lohr made deliveries. The pickets departed as soon as the Lohr delivery trucks departed.

The Sales Agreements for Meetings at Hotels

Three labor groups entered into separate, independent agreements with the Hotels to hold meetings at the Hotels during September 2005. First, on April 26, 2005, Jobs with Education Fund signed an agreement with the Hotels, for Jobs with Justice's ("JWJ") annual meeting scheduled for September 22 to 24. Next, on August 5, 2005, UFCW signed an agreement for a meeting to be held from September 26 to 29.

The UFCW and JWJ agreements included liquidated damages clauses in the event that the groups cancelled their meetings for any reason other than an "excused non-performance." The UFCW contract included an additional liquidated damages clause if the UFCW did not rent a minimum number of rooms. Both the JWJ and UFCW contracts specified that cancellation in the event of strikes and labor disputes would not result in any liability for the contracting labor group; any cancellations for such reasons fell under the categories of "excused non-performance" in the JWJ contract and "force majeure" in the UFCW contract.[14] The UFCW contract added the provision that cancellation in the event of handbilling would not result in liability.

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[14] In the JWJ contract, the following language under the "Excused Non-performance" category was included:

> If either Hotel or Jobs with Justice is prevented from or delayed in performing any act required of it hereunder, and such prevention or delay is caused by disruption due to . . . strikes, labor disputes . . . , or if performance here under would foreseeably involve either party in or subject it to the effects of a labor dispute and the party therefore withholds or delays performance, it shall have no liability there from.

Finally, on September 6, 2005, CTWC and the Hotels signed an agreement to hold the labor federation's founding convention from September 24 to 28, at the Hotels. The sales agreement between CTWC and the Hotels specified such terms as room rates, food and beverage rates, method of payment, and billing arrangements. The agreement also specified that the Hotels would provide and serve all food and beverages for the functions. The contract included liquidated damages provisions, in the event CTWC failed to meet a minimum specified commitment of room, food, and beverage usage, or cancelled the contract.

The provision that triggered the instant charge was found in the CTWC agreement's "Labor Statement," which provided, in its second paragraph:

> Based on our verbal conversations, I'm pleased to confirm that the Renaissance Grand & Suites Hotels have agreed to not accept any product from Lohr Distributors for 30 days. This arrangement shall commence on the 12th of September (2 weeks before your arrival date) and will end on midnight, October 11, 2005.

In addition, the first paragraph of the Labor Statement included the following standard language; identical language is contained in the UFCW sales agreement:

> If the Hotel no longer maintains a collective-bargaining agreement with its employees or the Hotel is involved in any labor disputes with its employees, employees of a management service contracted by the Hotel to provide any Hotel services, or contractors hired by the Hotel, this agreement may be cancelled by the Group without penalty, regardless of the cancellation procedures, policies, or fees set forth in this agreement.

The sales agreement with CTWC was negotiated by the IBT Travel Services Director and the Hotels' Senior Account Executive, as well as by the Marriott national sales office's Director of National Accounts. The Hotels' General Manager never spoke to the IBT Travel Services Director directly. Before or while negotiating for the initial sales agreement with Marriott's national sales office, CTWC became aware of the labor dispute with Lohr and of Teamsters Local 600's plan to continue to picket Lohr during beer deliveries at the Hotels during the planned CTWC/CTW convention.

The sales agreement apparently reflected changes to what was initially proposed as a 10-day delivery ban. The Hotels' negotiators told the Hotels' General Manager that a 10-day delivery ban would not accommodate the potential customers, and the Hotels' Director of National Accounts requested a 30-day suspension of Lohr deliveries covering the eight-day period that JWJ, UFCW, and CTW would be at the Hotels, as well as covering a period before and after the three meetings. The Hotels' negotiators told the Hotels' General Manager that CTWC was concerned about its image and the message it would project in holding CTW's constitutional convention at a hotel that was receiving deliveries from an employer with whom there was a labor dispute. After negotiation by the Hotels' national and local representatives with the IBT Travel Manager, and approval by the Hotels' General Manager, the September 6 contract was signed by the Hotels' Senior Account Executive and by CTWC's Secretary-Treasurer, who later became CTW's Secretary-Treasurer.

In anticipation of the ban on Lohr deliveries, the Hotels stockpiled AB products to meet their typical needs for a 30-day period. It is unclear whether the delivery ban was the Hotels' idea originally, but CTWC did not explicitly condition its stay at the hotel on such a ban, and the Hotels implemented the suspension to make the customers' stay more comfortable.

<u>September 12 letters announce Hotels' ban on service of AB products at two groups' meetings</u>

Following the Hotels' and CTWC's execution of the September 6 sales agreement, the Hotels' General Manager, at the request of the Hotels' Director of National Accounts, sent letters to the three labor groups. In those letters, dated September 12, he announced (1) that he had directed the Hotels' staff to cease ordering and accepting deliveries from Lohr for 30 days; (2) that he had instructed the banquet staff not to serve AB products at the JWJ and CTWC banquets and to cease promoting AB products during the three groups' stay at the Hotels;[15] and (3) that the Hotels' bars, restaurants, and room service would continue to serve AB products while supplies lasted. The evidence does not show whether any of the three groups had asked the Director of National Accounts for this letter.

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[15] UFCW did not contract to have food and beverage services at their events. The promotion cessation included the removal of AB beer taps and coasters while the groups were at the Hotels.

September 20 letters announce Hotels' ban on service of AB products while labor groups hold conventions

Following further discussions among the Hotels' negotiators and the IBT Travel Services representative, the Hotels' Director of National Accounts asked that the Hotels' General Manager make CTWC more comfortable by suspending service of AB products in the Hotels' bars and restaurants while the three labor groups were at the hotel. The Hotels' General Manager agreed to suspend service. He issued new letters dated September 20 that revised the September 12 letters to add the provision that he had "further directed the staff in the hotels bar, restaurant, and room service to refrain from serving [AB] products during the period that the before mentioned groups are in-house." CTWC did not condition its stay on the additional arrangements.

According to the Hotels, the decision to accommodate the labor federation as a consumer with regard to the AB products was not uncommon. For example, in the past, the Hotels had accommodated a religious group's request that the Renaissance Grand's kitchen be converted to serve only a vegan/vegetarian buffet during that group's stay at the Hotels.

The Hotels resumed promoting and serving AB products on September 29, the same date that the UFCW meeting ended, and resumed accepting Lohr deliveries on October 12.

ACTION

We conclude that the charge alleging a Section 8(e) violation committed by CTWC, should be dismissed, absent withdrawal. This charge presents difficult and novel legal questions, and this case is not the proper vehicle to put these difficult issues before the Board. First, whether the coalition of labor organizations organized to establish a new labor federation and then to cease to exist, was a labor organization is a case of first impression and because the coalition no longer exists, it is a unique case which is unlikely ever to recur. Second, if the coalition was a labor organization, the question whether Section 8(e) was violated arises in the context of a labor organization acting as a customer of services in a commercial transaction rather than acting solely in its capacity as a labor organization. In this context, there is a serious question whether Congress was concerned with this type of conduct. Further, to the extent that the sales agreement between the Hotels and the labor coalition arguably constituted a Section 8(e) agreement, it is a contract of very limited duration. Under all of these circumstances, this case is not the appropriate vehicle to present these novel and

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A. Applicable principles

Section 8(e) makes it an unfair labor practice for a labor organization and an employer "to enter into any contract or agreement, express or implied, whereby such employer . . . agrees to . . . cease doing business with any other person . . . ." Secondary agreements that impose a partial cessation of, or interference with, business will violate Section 8(e) to the same extent as agreements that impose a total cessation.[16] The key to analyzing the legality of agreements under Section 8(e) is whether they address the labor relations of the contracting employer regarding his own employees or are, on the contrary, "tactically calculated to satisfy union objectives elsewhere."[17] An agreement is secondary where its "tactical object" benefits persons "other than the boycotting employees or other employees of the primary employer...."[18]

Despite Section 8(e)'s "sweeping" language, however, the Supreme Court, in interpreting the legislative history, has read the provision to avoid some literal applications.

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[16] See Operating Engineers Local 520 (Massman Constr. Co.), 327 NLRB 1257, 1257-1258 (1999); Int'l Longshoremen's Local 1410, 235 NLRB 172, 179 (1978).

[17] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 644-645 (1967)(Section 8(e) does not prohibit agreements to preserve bargaining unit work for bargaining unit employees). See also Retail Clerks Local 1288 (Nickel's Pay-Less Stores), 163 NLRB 817, 819 (1967) ("provisions are secondary and unlawful if they have as their principal objective the regulation of the labor policies of other employers and not the protection of the unit"), enf'd in pertinent part, 390 F.2d 858, 861-862 (D.C. Cir. 1968).

[18] National Woodwork Mfrs. Ass'n, 386 U.S. at 645.

Thus, 8(e) does not prohibit agreements to preserve bargaining unit work for bargaining unit employees, even though they have a cease-doing-business effect.[19] Congress also did not intend that Section 8(e) would repudiate the distinction in Section 8(b)(4)(B) jurisprudence between primary and secondary boycotts; Section 8(e) would not have broader reach than Section 8(b)(4)(B), but would apply only to secondary activity.[20]

When Congress considered enacting Section 8(e), the Senate at that time contemplated banning only Section 8(e) agreements arising in the trucking industry.[21] It was widely accepted that the hot cargo prohibition would be particularly important in the trucking industry.[22] Prior to 8(e)'s enactment, in Sand Door,[23] the Supreme Court held that a then-lawful hot cargo clause was not a defense to secondary boycott activity that sought to enforce the clause. The Court noted, however, that such clauses may have been originally forced upon the employer by proscribed union conduct.[24] Congress, in closing this loophole with Section 8(e), intended to prevent the possibility of court actions to enforce hot cargo clauses, and also to avoid union pressure upon employers to engage in "voluntary"

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[19] National Woodwork Mfrs. Ass'n, 386 U.S. at 635. See Carpenters Local 745 (SC Pacific Corp.), 312 NLRB 903, 911 (1993), enf'd mem. 73 F.3d 370 (9th Cir. 1995); Retail Clerks Local 1288 (Nickel's Payless), 163 NLRB at 819.

[20] National Woodwork Mfrs. Ass'n, 386 U.S. at 637-639.

[21] See Aaron, Benjamin, "The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. 1086, 1116 (1960).

[22] See Cox, Archibald, "The Landrum-Griffin Amendments to the National Labor Relations Act," 44 Minn. L. Rev. 257, 273-274 (1959). Before Congress enacted Section 8(e), many Teamsters unions bargained for clauses that included such language as: "It shall not be a violation of this Agreement and it shall not be cause for discharge if any employer or employees . . . refuse to handle unfair goods. . . ." Aaron, Benjamin, "The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. at 1116-1117 (citing Teamsters Local 728 (Genuine Parts Co.), 119 NLRB 399, 400 (1957), enf'd 265 F.2d 439 (5th Cir.), cert. denied, 361 U.S. 917 (1959)).

[23] Carpenters Local 1976 (Sand Door & Plywood Co.) v. NLRB, 357 U.S. 93, 103-108 (1958).

[24] Id., 357 U.S. at 106.

boycotts.[25] Congress excepted the apparel and clothing industries from Section 8(e)'s ambit as such a "prohibition would have raised havoc."[26] Although Congress had no information on the impact of hot cargo clauses on other industries, it extended the prohibition to other industries, making "the loose assumption that a clause which was contrary to public policy in the transportation industry must be equally undesirable in other segments of the economy."[27]

Section 8(e) parallels Section 8(b)(4). Under Section 8(b)(4), all union conduct that coerces, threatens, or restrains third parties to cease doing business with a neutral employer is proscribed.[28] Section 8(b)(4) reflects the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes, and of shielding unoffending employers and others from pressures in controversies not their own."[29] Both Section 8(e) and Section 8(b)(4) carry the same distinctions between primary and secondary activity, and neither reaches employees' action to pressure their employer to preserve work traditionally performed by the employees.[30]

Section 8(b)(4), as interpreted by NLRB v. Servette, Inc.,[31] permits appeals or requests to management to make

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[25] National Woodwork Mfrs. Ass'n, 386 U.S. at 634.

[26] Cox, 44 Minn. L. Rev. at 273.

[27] Id. Professor Cox interpreted the statute to ban "blacklisting specified employers or groups of employers because their products or labor policies are objectionable to the union."

[28] NLRB v. Denver Bldg. & Trades Council, 341 U.S. 675, 692 (1951). See also NLRB v. Fruits & Vegetable Packers (Tree Fruits, Inc.), 377 U.S. 58, 68 (1964).

[29] NLRB v. Denver Bldg. & Trades Council, 341 U.S. at 688-689.

[30] National Woodwork Mfrs. Ass'n, 386 U.S. at 635, 637-639.

[31] 377 U.S. 46 (1964). In Servette, union representatives of employees of a wholesale distributor, Servette, did not violate Section 8(b)(4)(i)(B) of the Act when they asked supermarket managers, who were customers of the primary employer Servette, to support a strike and to cease doing business with the primary employer. The union threatened to distribute handbills asking store patrons to not purchase

business decisions benefiting the labor organization's constituency, or threats to engage in protected activity to enlist neutral employers' support, as they are not coercive. Under Servette, attempts to persuade managers of a secondary employer to make the business judgment to cease doing business with a primary violate Section 8(b)(4) only if such attempts are coercive.[32] The discretion to comply with a union's request must remain with management. If the agreement regarding managerial action can be enforced by a union, notwithstanding management's changed and opposing view, the agreement violates Section 8(e).[33]

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specified items distributed by the distributor Servette. Construing Section 8(b)(4)(i)(B), the Court held that a supermarket manager is an "individual" under (i). 377 U.S. at 49-50. The Court further held that to ask supermarket managers to refuse to handle the primary Servette's products did not constitute an unlawful attempt "to induce or encourage them to cease performing their managerial duties in order to force their employers to cease doing business with Servette." Id. at 50-51. Instead, the Court said that the union appeals to the managers constituted appeals to ask them to make a managerial decision within their own authority. Thus, the Court explained, appeals to employees of a secondary employer for voluntary cooperation, unaccompanied by threats, coercion, or restraints, were lawful. Id. at 50-51.

With the 1959 amendments, Congress had closed certain loopholes, including substituting "any individual employed by any person" for the original phrase, "the employees of any employer," and deleting the word "concerted," but by doing so Congress did not intend to make unlawful what had been lawful under the predecessor Section 8(b)(4)(A) as far as appeals to managerial discretion. Id. at 51-52. To reach threats, coercion or restraint aimed at a neutral employer, however, which Congress had determined would be unlawful, Congress added the (ii) provision.

Thus, the Court read 8(b)(4)(i) as prohibiting inducement of supermarket managers to withhold their own services from their employer, and 8(b)(4)(ii) as prohibiting inducement of the managers' discretion if the inducement constituted a threat, coercion, or restraint of the exercise. Id. at 54.

[32] Id. at 54.

[33] Cf. Teamsters Local 20 v. Morton, 377 U.S. 252, 260 n.14 (1964) (Act permitted union to persuade neutral, customer of primary, to boycott primary during strike; no claim presented that neutral's "voluntary compliance" with the union's request for a boycott, "unsupported by any

B. The difficult and novel Section 8(e) legal questions will not readily be resolved under the applicable principles

Applying the above legal principles, it is unclear whether the delivery ban provision in the CTWC sales agreement's "Labor Statement" violates Section 8(e) or whether the provision embodies an arrangement that is not the type of hot cargo agreement that Congress intended to ban.[34] These questions have rarely arisen under the Act in the context of a labor organization as a customer and the seller of services to the labor organization.

Reading the statute literally, CTWC and the Hotels arguably entered into an unlawful agreement. They entered into a sales agreement whereby the Hotels agreed to cease doing business for 30 days with Lohr, which has a primary dispute with another labor organization, Teamsters Local 600. Under the agreement, if the Hotels did not honor the 30-day ban on accepting deliveries, the Hotels might face a breach of contract action for damages. Having no work preservation object, and not falling within Section 8(e)'s construction or garment industry exceptions, an argument could be made that the Hotels entered into an enforceable agreement with a statutory labor organization to cease doing business with an employer by refusing for 30 days to accept deliveries. Under this view, this is not an agreement that is addressed to the labor relations of the contracting employer (the Hotels), but is "tactically calculated to satisfy union objectives elsewhere," with the primary dispute with Lohr, and thus violates Section 8(e).

In addition, the argument could be made that CTWC has done more than make a request that would be permitted by Servette, and the Hotels have done more than merely acquiesce to that request. Instead, CTWC and the Hotels

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consideration," constituted a Section 8(e) agreement); Freight Drivers Local 208 (De Anza Delivery System, Inc.), 224 NLRB 1116, 1123-24 (1976)(acquiescence to a union request not to do business with a targeted primary is not a contract or agreement within the meaning of 8(e); although union's picketing violated 8(b)(4)(B), neutrals' resulting acquiescence by ceasing business with a primary was not an "agreement" under 8(e)).

[34] See Associated Musicians (Huntington Town House), 203 NLRB 1078, 1082 (1973)(agreement between secondary purchasers of music and union that the former would only do business with union bands and not with nonunion primary band violates Section 8(e)).

have entered into a contractual agreement whereby the Hotels, as the secondary employer, will not do business with Lohr, the primary, and thus have violated 8(e). The evidence suggests that the September 6 sales agreement is enforceable as a contract. The parties had a meeting of the minds as to the 30-day ban on deliveries where representatives of both parties, the Hotels and CTWC, signed the contract. Thus, as the contract would otherwise be enforceable, it is not clear whether the Hotels merely exercised discretion and chose to acquiesce, as under Servette, to a CTWC request to boycott a certain product.[35] In this agreement between Employer and Union, the Employer-Hotels has agreed not to do business with another employer, Lohr, generally because of the latter's labor relations, and the Union-CTWC does not have a work preservation defense.

The question here, however, is whether Congress intended to include within 8(e) an agreement between a union and a neutral employer that the neutral will boycott a primary when the agreement is part of a commercial transaction in which the union is acting as a consumer and the neutral as the service provider. Thus, it could be argued here that the relationship of the signatory union and employer as consumer and service provider makes this agreement unlike the type of agreements that Section 8(e) was intended to prohibit. In such circumstances, CTWC was not acting in the capacity of an employee representative when it entered into the sales agreement, and the purpose of Section 8(e) does not contemplate making unlawful that agreement. It is undisputed that consumer groups that are not Section 2(5) organizations would be entitled to enter into a sales agreement accommodating an interest similar to that at issue here (i.e., not having to cross a picket line when entering the Hotels during a delivery by Lohr). It is also well settled that the Act protects consumer boycotts. Therefore, it could be appropriate to treat CTWC in the same way as another consumer when CTWC was acting in its commercial capacity and not in its capacity as a representative of employees. Just as the Hotels accommodated a religious group during its meeting at the Hotels, the Hotels also sought to accommodate CTWC.[36]

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[35] See Freight Drivers Local 208 (De Anza Delivery System, Inc.), 224 NLRB at 1123-24.

[36] As to the 8-day ban on serving AB products at the Hotels, the evidence does not establish that the letters setting forth the arrangement, in which the Hotels stated that it would cease serving AB products during the period while the three labor groups were holding meetings, were anything more than a manager's statement of how he chose to exercise his discretion. The evidence does not establish that CTWC agreed

In addition, the agreed-upon restriction differs from what would be a typical Section 8(e) clause in an agreement. Initially, the delivery ban was part of a commercial arrangement between a hotel services vendor and a customer. Also, CTWC and the Hotels did not agree to a boycott on deliveries for the duration of the primary dispute, but to a ban for the 30 days surrounding the convention. Although even a partial interference with a neutral employer's business may technically violate Section 8(e), the short term of the ban raises the question whether CTWC was acting solely as a consumer of hotel services.

Although the 30-day restriction is longer than the actual term of the three meetings, that extension of time does not, in itself, show a secondary object. CTWC did not seek a restriction that was to stay in place for the duration of the labor dispute. And the 30-day restriction does not appear to be "tactically calculated to satisfy union objectives elsewhere."[37] Rather, extending the ban beyond the actual term of the meetings apparently was intended to ensure that the St. Louis labor dispute would not embarrass the three labor groups while they were installing, holding, and dismantling their conventions.

Without such an assurance, any one of the three groups could have cancelled the meeting plans without liability. Due to the provisions in all three sales agreements permitting cancellation if labor disputes arose, including just handbilling in the case of the UFCW contract, it is arguable that the Hotels had a business justification to include the delivery ban in the agreement, and to extend it for 30 days, to ensure that CTWC/CTW or the other two labor

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to the serving ban, and thus, it does not establish that the parties had a meeting of the minds as to that term or that an enforceable agreement was created. See generally Teamsters Local 282, 262 NLRB 528, 548 (1982) (holding that Section 8(e) was not violated when the evidence showed only that union expressed its wishes favoring union labor; the evidence did not show that the employer agreed "on a continuing basis . . . to cease doing business with persons with whom the Union may have future disputes") (JD adopted by Board). Cf. Associated Musicians Local 802, 225 NLRB 559, 565 (1976), enf'd mem., 559 F.2d 1204 (2d Cir. 1977)(holding that evidence established meeting of the minds and formation of Section 8(e) contract).

[37] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. at 644-645. See also Retail Clerks Local 1288 (Nickel's Pay-Less Stores), 163 NLRB at 819.

groups would not be faced with crossing picket lines to attend their meetings. If they were, they could have cancelled without liability. Such cancellations, permitted under the three contracts, might have imposed a greater burden on the Hotels than the delivery ban.

As to whether CTWC was a statutory labor organization when it entered into the sales agreement with the Hotels, that question presents additional close and difficult issues that also undermine any warrant for issuing complaint.

The Board and the courts have generally taken an expansive view of what constitutes a labor organization under Section 2(5) of the Act.[38] Under Section 2(5), a labor organization is one in which: (1) employees participate in the organization or committee; (2) the organization or committee exists in whole or in part to deal with the employer; and (3) these dealings with the employer concern such statutory subjects as grievances, labor disputes, wages, rates of pay, and hours of employment, or conditions of work.[39]

As to the first factor, employee participation, where labor organizations are constituent parts of a larger organization, employees participate in the larger organization through the labor organizations.[40] As to the second and third factors, whether the organization exists to deal with the employer, and whether these dealings concern statutory subjects, the Supreme Court has held that the term "dealing with" is not synonymous with the more limited term "bargaining with," but rather must be interpreted broadly.[41]

As to the first factor, CTWC acknowledges that employees participated in the organization based on its primary participants being the constituent unions' elected officers. As to the second and third factors, CTW asserts

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[38] See generally NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959).

[39] Electromation, Inc., 309 NLRB 990, 994 (1992), enf'd, 35 F.3d 1148 (7th Cir. 1994). See E.I. du Pont & Co., 311 NLRB 893, 894 (1993).

[40] Bldg & Constr. Trades Council of Reading, 155 NLRB 1184 (1965).

[41] NLRB v. Cabot Carbon Co., 360 U.S. at 211-218. See Ona Corp., 285 NLRB 400, 405 (1987)("The statute has been broadly construed with respect to what constitutes 'dealing with'").

that its purpose was not to deal with employers, but to influence AFL-CIO policies, such as a renewed focus on organizing. Because CTWC did not seek to represent employees in any bargaining unit, CTWC asserts it is not a labor organization.

CTWC was comprised, however, of constituent affiliates that did seek to represent employees and CTWC did seek to support organizing. In Bldg & Constr. Trades Council of Reading,[42] the Board adopted an administrative law judge's conclusion that rejected a building trades council's argument that it was not a Section 2(5) organization because it had no employee membership and did not negotiate with employers or enter into agreements with employers regarding wages, hours, and other terms and conditions of employment. The judge found that the building trades council was a labor organization based on the following factors: the constituent and autonomous union affiliates functioned as a unit through the council; one of the council's functions was to organize employees of nonunion employers for its constituent locals; successful organizing would result in recognition of the constituent entities; and recognition is the prerequisite for negotiating with an employer and is within the broad term "dealing with" under the Act.[43] Similarly here, the constituent groups acted through CTWC with the primary aim of organizing the unorganized, which, if successful, leads to "dealing with" employers.

Further as stated above, CTWC's announced goal, before disaffiliation and before the St. Louis convention, was to unite workers in their industries and to raise standards for pay, health care, pensions, and working conditions. The group also aimed to support the coordinated efforts of the affiliates, including an increased focus on organizing "to

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[42] 155 NLRB 1184 (1965).

[43] 155 NLRB at 1186-1187. The administrative law judge further found that the council also acted as the agent of its affiliated locals, which were concededly Section 2(5) labor organizations. Id. at 1187. Cf. Center for United Labor Action, 219 NLRB 873, 874 (1975)(no Section 2(5) organization existed when entity acted, sometimes through picketing and leafleting, to support general employee-related social causes, but did not "deal with" employers); Ass'n of Professional Flight Attendants (American Airlines), 1987 WL 103406, Advice Memorandum dated June 9, 1987 (no Section 2(5) organization existed when statutory employees did not participate in the entity, Corporate Campaign, Inc., and labor organizations, which retained entity's services, were not its constituent parts).

boost union strength and improve workers' lives." These goals are not unlike the goals set forth in the CIO's constitution, when it was found to be a labor organization under the Act.[44]

In finding the CIO to be a labor organization under the Act, the Fifth Circuit rejected a similar contention that a labor organization is a statutory labor organization only when it bargains directly with employers, but not when it is "indirectly engaged through the full support accorded an affiliated national or international union."[45] As the Fifth Circuit stated, "[t]o determine that the CIO does not come within the terms of the statute would require us to overlook the realities and substance of its objectives and operations."[46] The objectives of the CIO, as discussed by the Fifth Circuit, were similar to those announced by CTWC. Thus, the CIO's objectives included: "to bring about effective organization of working men and women . . . and to unite them for common action into labor unions for their mutual aid and protection;" and "to extend the benefits of collective bargaining and to secure for the workers means to establish peaceful relations with their employers, by forming labor unions . . . ."[47]

On the other hand, notwithstanding the stated goals, the main thrust of CTWC was to reform the AFL-CIO and failing that to form a new labor alliance. Thus CTWC was only in existence for a short period of time before it realized that it could not achieve the desired changes in the AFL-CIO, and therefore formed CTW. Accordingly,

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[44] NLRB v. Postex Cotton Mills, Inc., 181 F.2d 919, 921 (5th Cir. 1950).

[45] Id. See NLRB v. Highland Park Mfg. Co., 341 U.S. 322, 324 (1951) (CIO is a labor organization) (citing Postex). See also Northern Virginia Broadcasters, Inc., 75 NLRB 11, 21-24 (1947)(Member Gray, dissenting), cited in, Highland Park, 341 U.S. at 324.

[46] Postex Cotton Mills, 181 F.2d at 921.

[47] Id. Similarly, in NLRB v. Westex Boot & Shoe Co., 190 F.2d 12 (5th Cir. 1951), the Fifth Circuit rejected an employer's contention that an unfair labor practice charge should be dismissed because the AFL was not a Section 2(5) organization. The Fifth Circuit said that to accept the employer's argument "'would require us to overlook the realities and substance of [the AFL's] objectives and operations.'" 190 F.2d at 13 (quoting Postex Cotton Mills, 181 F.2d at 921, and citing Highland Park).

although arguably the signatory CTWC was a statutory labor organization, resolving this additional question of whether CTWC was a 2(5) labor organization adds to the complexity of this case. And, the likelihood that this question will recur is small when CTWC existed only for a few months.[48] For these additional reasons, the facts of this case do not present a good vehicle to take the difficult Section 8(e) questions to the Board.

In sum, whether CTWC is a labor organization and whether the Labor Statement provision of the sales agreement violates Section 8(e) raise difficult and novel legal questions that have not been previously raised before the Board. Under the circumstances presented, we conclude that given the circumstances of this case, this is not an appropriate vehicle to present this Section 8(e) issue to the Board.

Agency status of CTW, IBT, and Teamsters Local 600

Finally, because for the reasons stated above, we conclude that the charges alleging that CTW, IBT and Teamsters Local 600 violated Section 8(e) should be dismissed, absent withdrawal, we need not reach the question whether any of these entities acted as agents of the others.

In sum, the charges alleging that CTW, IBT, and Teamsters Local 600 violated Section 8(e) should be dismissed, absent withdrawal.

B.J.K.

[48] Subsidiary to this issue are the questions whether, if the coalition was a labor organization, but no longer exists, (1) is CTW a successor to or alter ego of CTWU which could be perused, and if not (2) what remedy would be available against the defunct CTWC?